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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,  
v. *Appellant,*

R.A. GRAY & COMPANY,  
*Appellee.*

OREGON-WASHINGTON CARPENTERS-EMPLOYERS  
PENSION TRUST FUND,  
v. *Appellant,*

R.A. GRAY & COMPANY,  
*Appellee.*

On Appeal from the United States Court of Appeals  
for the Ninth Circuit

**REPLY BRIEF FOR APPELLANT  
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**REPLY BRIEF FOR APPELLANT  
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A single issue is presented by this appeal—whether Congress acted constitutionally, within the Due Process Clause, in making the withdrawal liability provisions of the Multiemployer Act effective five months prior to the law's enactment.

Gray and its supporting *amici* argue that withdrawal liability that was retroactive—even for only five months—did not satisfy due process standards because it imposed obligations exceeding contractual limits. This untenable argument, as well as others advanced by Gray and the *amici*, relates not only to the five-month retroactive application of the Multiemployer Act, but also to the *per se* constitutionality of withdrawal liability. In this brief we address first the arguments pertaining to retroactivity—

which is the only issue squarely before the Court. We then discuss briefly the various general attacks on withdrawal liability. The Multiemployer Act, we submit, satisfies any arguably applicable due process standard.<sup>1</sup>

## THE FIVE-MONTH RETROACTIVITY OF THE MULTIEMPLOYER ACT IS CONSTITUTIONAL

### A. Constitutionality Depends on Whether Retroactivity Is Rational

Under *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), a separate, identifiable basis in reason must support a law's application as of a date that precedes its formal enactment: "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." 428 U.S. at 17. According to Gray and various *amici*, "[r]ationality" is not the touchstone" (Gray Br. 13), retroactive legislation can be supported only by "a special and particularized showing of justification" (Gray Br. 31), and it must meet "a higher burden of fairness and demonstrated public need" (Transport Motor Express ("TMX") Br. 11).<sup>2</sup>

<sup>1</sup> In addition to the decisions cited in our opening brief (p. 17 n.18), the Seventh Circuit has recently upheld the Multiemployer Act as applied to all withdrawals in *Peick v. PBGC*, 724 F.2d 1247 (7th Cir. 1983) ("*Peick*"), the Second Circuit has upheld the Act's application to pre-enactment withdrawals in *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 5 Emp. Ben. Cases ("EBC") 1001 (2d Cir. 1984) ("*Textile Workers*"), and the United States District Court for the District of Columbia has upheld the Act's application to post-enactment withdrawals in *Dorn's Transportation, Inc. v. IAM National Pension Fund, Benefit Plan A*, C.A. No. 82-1141 (D.D.C., Jan. 19, 1984) ("*Dorn's*").

<sup>2</sup> Gray's threshold argument appears to be that, except for income tax legislation, Congress is constitutionally proscribed from enacting any retroactive effective dates, regardless of their particularized justification: "Congress has no power to require citizens to conform their conduct to standards contained in a bill which may or may not become law." (Gray Br. 17-18) (emphasis in original). This categorical proposition (from which appellee quickly recedes (Gray Br. 24-31)) is plainly untrue in light of this Court's deferral

However, as the Seventh Circuit noted in *Peick* (724 F.2d at 1266) :

In *Turner Elkhorn Mining*, the Court in no way indicated some special distaste for retroactive legislation, but merely stated that not only must legislation as a whole be rational and non-arbitrary but also that any retroactive aspects of the legislation must, in particular, be rationally and non-arbitrarily related to legislative goals.

*Turner Elkhorn* thus establishes that if such a rational policy justifies retroactivity, no more "particularized" or "higher" burden need be met.<sup>3</sup>

**B. Congress Rationally Concluded that Employers Were "Forewarned of the Possibility" of Statutory Liability**

Were it true, as Gray and its *amici* assert, that retroactive withdrawal liability was totally new and unexpected, its constitutionality might be debatable. The fact is, however, that multiemployer termination liability had been a feature of federal pension law since 1974. The withdrawal liability provisions ultimately adopted in the Multiemployer Act were introduced in 1979. As the Second Circuit found in *Textile Workers*, 5 EBC at 1009, during the pre-enactment period "[n]otice was everywhere." And as the Seventh Circuit explained in *Peick*, 724 F.2d at 1269 (footnote omitted) :

to the wisdom of Congress in making laws retroactive in order to assure their effectiveness. See PBGC Br. 32-33 and nn.27, 29.

<sup>3</sup> The test enunciated in *Nachman Corp. v. PBGC*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980) ("*Nachman*"), is urged by various *amici*. The *Nachman* test, however, is an application of Contract Clause principles, which the Seventh Circuit itself has acknowledged are inapplicable to challenges to the Multiemployer Act. *Peick*, 724 F.2d at 1263, 1270.

Assuming the applicability of the *Nachman* analysis, we rely on *Peick*, 724 F.2d at 1270-74; *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628, 638-39 (4th Cir. 1983), *petition for cert. pending*, No. 83-541 ("*Republic*") ; and *Textile Workers*, 5 EBC at 1007-1010.

[T]he intent of Congress to provide for the retrospective imposition of liability was quite clear from the very beginning of the legislative process . . . . [E]mployers who withdrew during [the retrospective] period cannot argue that they are now being required to pay wholly unanticipated liabilities.

Indeed, the pervasiveness of this notice is precisely what necessitated retroactive liability. The extensive public awareness of the impending law and the ability to undermine the law's purposes during protracted legislative debate underscore the rationality of Congress' retroactive effective date. See PBGC Br. 39 n.36.<sup>4</sup>

Neither Gray nor, with one possible exception, any of its *amici* who represent hundreds of thousands of employers, claim that they were in fact unaware of the legislative progress of the Multiemployer Act.<sup>5</sup> Instead, Gray argues abstractly that until a president signs a law, even those who are already extensively regulated are constitutionally entitled to ignore that regulatory environment as well as the comprehensive legislative process culminating in the law's enactment. That argument disregards common experience and common sense, and would make any form of retroactivity automatically unconstitutional.

Many of the briefs opposing our position rely on this Court's holding in *Untermeyer v. Anderson*, 276 U.S. 440 (1928), as support for the proposition that "until the legislative process is complete there is no law and individuals cannot be held to standards which do not yet exist." Gray Br. 18-19. However, this Court clearly explained in

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<sup>4</sup> Cf. *Is Your Pension Safe From Company Shenanigans?*, U.S. News & World Report 73, 74 (Feb. 6, 1984) ("just the threat of [legislation regulating pension plan terminations] may be enough to accelerate the pace of terminations as companies rush to claim extra millions of dollars while they can."). Appendix to this Reply Brief ("R. App.") 1a.

<sup>5</sup> *Amicus* Republic implies that it was unaware of the legislative events leading to the enactment of the Act, Br. 17-18. None of the district courts and courts of appeals in which Republic has pressed its case has adopted, much less relied upon, such a finding.

*Welch v. Henry*, 305 U.S. 134, 147 (1938), which upheld retroactive imposition of an income tax, that the decision in *Untermeyer* principally turned on the absence of any warning that a gift tax would be imposed. The Court noted that “[e]ven a retroactive gift tax has been held valid where the donor was forewarned by the statute books of the possibility of such a levy.” *Id.* (citing *Milliken v. United States*, 283 U.S. 15 (1931)).

Far from supporting Gray, these cases demonstrate why retroactive application of the Multiemployer Act was entirely valid. Multiemployer plans had been regulated and subject to termination liability since passage of ERISA. While the precise form of withdrawal liability had not existed before, employers had been “forewarned by the statute books of the possibility of such a levy.”

### C. Retroactive Withdrawal Liability Is a Rational Response to a Legitimate Legislative Concern

Gray and its *amici* have argued that retroactive withdrawal liability was not necessary because collective bargaining agreements limited employer withdrawals from multiemployer plans. Even assuming such a limitation, it does not follow that the Act’s application to pre-enactment withdrawals was irrational. Congress considered the PBGC’s legislative recommendations and other versions of the Multiemployer Act for over one and one-half years—more than half the period of a typical collective bargaining agreement. Gray Br. 52. Congress could reasonably have believed that many collective bargaining agreements would expire during the extended legislative process. Accordingly, from the outset, Congress was urged to make the Multiemployer Act retroactive.<sup>6</sup> Indeed, the possibility that a substantial number of employers could

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<sup>6</sup> *Hearings on the Multiemployer Pension Plan Amendments Act of 1979 before the Task Force on Welfare and Pension Plans of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor, House of Representatives, 96th Cong., 1st Sess.* (1980) 385 (Bert Seidman, Department of Social Security, AFL-CIO), 388 (Don Seifman, Counsel, Retail Clerks International Union).

withdraw during the five-month retroactive period ultimately provided by law was hardly illusory. Construction industry bargaining agreements, for instance, are frequently negotiated during the spring, *see* 1289 BNA Construction Labor Rep. A-13 (Aug. 6, 1980) (R. App. 5a-6a), and the Carpenters Master Labor Agreement, pursuant to which Gray and many other employers contributed to the Trust Fund, expired on May 31, 1980 (Joint Appendix ("J. App.") 13, 17), during the very retroactive period at issue in this case. Withdrawal by the signatories to that agreement could have substantially harmed the Fund. Furthermore, withdrawals may result from sales of businesses, liquidations, relocations outside the jurisdiction of a plan, and various other events that are not subject to the constraints of collective bargaining.<sup>7</sup>

To be sure, retroactive withdrawal liability may sometimes result in hardship. But isolated hardships result from *any* economic legislation, whether or not retroactive. They are an inevitable consequence of "legislative acts adjusting the burdens and benefits of economic life." *Turner Elkhorn*, 428 U.S. at 15. The issue is not whether such hardships exist but whether Congress had a reasonable basis for believing that, absent retroactivity, employers would withdraw prematurely in order to avoid withdrawal liability.<sup>8</sup> Plainly Congress

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<sup>7</sup> It is well established that the sale of a business need not effect a transfer of all of the seller's obligations under a collective bargaining agreement. *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 257 (1974). Similarly, in the construction industry, many employers adopt "pre-hire" agreements that they may abrogate at will. *Jim McNeff, Inc. v. Todd*, 103 S. Ct. 1753, 1758-59 (1983). This Court's recent holding in *NLRB v. Bildisco & Bildisco*, 52 U.S.L.W. 4270 (Feb. 22, 1984), further illustrates that an employer's collective bargaining agreement is not an economic straitjacket.

<sup>8</sup> Congress, of course, is the appropriate forum for any reconsideration of the reasons for retroactivity. For example, Senator Nickles and Representative Erlenborn have introduced bills that provide, *inter alia*, for the elimination of retroactive withdrawal

did.<sup>9</sup>

Gray also argues that even if Congress was empowered to give the Multiemployer Act retroactive effect, the effective date it chose was arbitrary. However, it is clear that every law must have *some* effective date, and April 29, 1980, was a rational choice.<sup>10</sup> Congress initially considered an effective date coinciding with submission of the PBGC's legislative proposal. After a year of legislative consideration, Congress concluded that the prospect of retroactive application had partially achieved its objective, and it determined to advance the Act's effective date to avoid imposing liability on those employers who had been committed to withdrawal prior to the Act's introduction. See PBGC Br. 12. This was a rational and proper course. It is not rendered invalid by the assertion that "politically powerful" employers were responsible for the change in effective date. The legislative record does not support the proposition that Congress simply succumbed to blandishments and entreaties by the "politically powerful." Nor should this Court ignore the fact that the National Association of Manufacturers and the U.S. Chamber of Commerce, along with large corporations such as United Technologies Corporation (*see infra*, page 17, note 22), have filed *amicus curiae* briefs supporting the appellee and made their voices heard in the Congress. 126 Cong. Rec. S10100 (daily ed. July 29, 1980) (Sen. Javits).<sup>11</sup> If

liability. 128 Cong. Rec. H706, E457-58 (daily ed. Feb. 9, 1984); *id.* S1497, S1515-16 (daily ed. Feb. 22, 1984).

<sup>9</sup> Gray and various *amici* go beyond arguing that retroactivity is unconstitutional and suggest that withdrawal liability could be constitutionally imposed only if Congress provided a "grace period." Gray Br. 20-21. No case has ever held or intimated, however, that a grace period is required to preserve the constitutionality of any legislation. And in this case, such a period would only have exacerbated the very problem—opportunistic withdrawals—that Congress reasonably sought to correct. *Peick*, 724 F.2d at 1269.

<sup>10</sup> The selection of any particular retroactive date is clearly not unconstitutionally arbitrary. *Cf. Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 86 (1978) ("arbitrary" liability limitation not unconstitutional).

<sup>11</sup> Indeed, contrary to the position they take in this Court, both the NAM and the Chamber supported a House rule whose purpose

the exercise of "political power" invalidated resulting legislation, few federal laws could survive constitutional challenge.

Once it was determined in April 1980 to amend the effective date initially proposed in the bill, Congress plainly could not have prescribed an effective date *after* April 1980. Had it done so, the public announcement of a future effective date would have encouraged the very conduct the retroactive date was designed to discourage. Congress could only have set a new date *prior* to April 1980 or coincident with the date on which the amendment was announced. On April 29, 1980, Senator Bentsen notified the Senate that the withdrawal liability provisions adopted by the Senate Finance Committee would apply to any withdrawals occurring on or after that date. 126 Cong. Rec. S4302-03 (daily ed.). As the district court in *Peick* stated, "the very care Congress exercised in picking [the Multiemployer Act's] effective date bolsters the case in favor of the statute." 539 F. Supp. 1025, 1055-56.

Gray suggests that the many tax cases which have upheld retroactive legislation are *sui generis* because tax laws merely allocate to taxpayers a particular share of government's expenses for the general welfare. The Fourth Circuit rejected this argument. *Republic*, 718 F.2d at 638. Moreover, the tax law rationale applies *a fortiori* to the instant case. Gray has been allocated a share of the cost of fulfilling pension obligations to the Fund's participants, including Gray's own former employees.<sup>12</sup> If Congress may retroactively reallocate the

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was to facilitate the passage of the Multiemployer Act. 126 Cong. Rec. H7864 (daily ed. Aug. 26, 1980) (Rep. Thompson). See also 284 BNA Pension Rep. A-22 (Mar. 21, 1980) (R. App. 1a-2a).

<sup>12</sup> Gray's reliance on *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935) ("*Alton*"), is misplaced. *Alton* was based upon assumptions which are now invalid. The Court in *Alton* treated railroad safety and efficiency as the only permissible legislative ends, implicitly rejecting any notion that employee retirement income security is a valid legislative concern. That premise is

general costs of government, it may certainly reallocate the costs of funding specific pension commitments from which employers like Gray have benefitted.

One *amicus* urges that this Court's recent decisions in *Arizona Governing Committee v. Norris*, 103 S. Ct. 3492 (1983), and *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), which dealt with whether this Court's decisions on a question of statutory construction should be given retroactive effect, govern the issue presented in this case. TMX Br. 11-12. Those cases related, however, to an issue on which there was no clear legislative mandate, *Manhart*, 435 U.S. at 721, and the Court determined that wholly unexpected, devastating results were not mandated by the substantive decision rendered in *Manhart*. In this case, by contrast, the legislative intent to make withdrawal liability briefly retroactive could not have been clearer; it was clearly presaged during the legislative process and explicitly prescribed in the law. The rationale of the above decisions does not control the wholly distinguishable situation where Congress has explicitly adopted a retroactive effective date.

Finally, Gray and some *amici* contend that, contrary to the Second, Fourth, and Seventh Circuits' understanding of *Turner Elkhorn* as supporting the constitutionality of retroactive withdrawal liability, the *Turner Elkhorn* case is distinguishable. There is a constitutional difference, these parties assert, between statutes that are merely retroactive "in effect" and those that are retroactive "in application." The Black Lung Act is said to fall into the former category because it imposes present consequences based on conditions that antedated the law, but that were

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plainly no longer true, as ERISA itself demonstrates. The court in *Dorn's* noted (slip op. at 13-13):

A worker's pension is understood today as a form of deferred compensation and not as a gratuity. The underpinnings of [Alton] have thus been so altered as to obsolete its principle that protection of pensions is not a legitimate end *per se*.

medically identified after the law was formally enacted. The Multiemployer Act is said to be different because the formal act that produces liability—the withdrawal from a multiemployer plan—occurred before enactment of the law.

That purported difference does not, however, affect the constitutionality of the law: in both cases, an employer is subject to liability for which it allegedly had no opportunity to prepare.<sup>13</sup> Another similar law, not heretofore discussed, has withstood constitutional challenges in several circuits—the Longshoremen's and Harbor Workers' Compensation Act (the "LHWCA"), 33 U.S.C. §§ 902-950. Amendments to the LHWCA required employers to pay death benefits to the widows of certain injured former employees, even where the cause of death was unrelated to the injury and where the employment relationship had ceased prior to the enactment of the law. *Id.* § 909; see, e.g., *St. Louis Ship Building and Steel Co. v. Casteel*, 583 F.2d 876 (8th Cir. 1978); *Norfolk, Baltimore & Carolina Lines, Inc. v. Director, Office of Workers' Compensation Programs*, 539 F.2d 378, 379 (4th Cir. 1976). Thus, the Black Lung Act, the amendments to the LHWCA, and the Multiemployer Act all require employers, on the basis of pre-enactment events, to pay liabilities not specifically required by their contracts.

Gray urges that because employer liability is not fixed under the Black Lung Act until the occurrence of post-enactment events, that law was entitled to, and benefitted from, a more deferential constitutional scrutiny than is appropriate to the Multiemployer Act. However, the basis for Gray's constitutional argument is its asserted right to rely on existing law in making business decisions, and this distinction is irrelevant to such reliance. The employers involved in *Turner Elkhorn* and in the LHWCA cases relied on their contracts and on pre-enactment law in making decisions regarding their workplaces. Subsequent leg-

<sup>13</sup> See Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 California Law Review 216, 220 (1960).

isolation altered the consequences of those decisions, subjecting the employers to liability based on completed relationships and on events beyond the employers' control—a not-yet-identified pneumoconiosis or an employee's post-enactment death while married could precipitate employer liability. Nonetheless, the laws were upheld as reasonable exercises of congressional power. The Multiemployer Act should be upheld on the same basis.<sup>14</sup>

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<sup>14</sup> Gray erroneously attaches constitutional significance to other asserted distinctions between this case and *Turner Elkhorn*. Gray emphasizes the government's role in initial funding of black lung benefits. Gray Br. 27. However, the Court made clear that its decision in *Turner Elkhorn* did not turn on the government's participation in the program. 428 U.S. at 16 n.14 and at 18.

Gray also urges that "the direct relationship in *Turner Elkhorn* between each employer's liability and the actual injury to its former employees"—a factor purportedly not present in the pension context—"was especially important" to the Court's decision, yet does not exist here. Gray Br. 27-28. The Black Lung Act, however, did not attempt to impose employer liability on the basis of responsibility. It imposed liability only on the most recent employer, even though the disease was the cumulative product of many years' exposure to conditions which might not even prevail in the most recent employer's mines. 20 C.F.R. § 725.493(a)(1)-(a)(4). Similarly, under the LHWCA, "the last employer covered by the Act is wholly liable even though an industrial injury or disease is caused in part by a subsequent employer who is not subject to the Act." *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1292 (9th Cir. 1983) (illness creating entitlement discovered 32 years after discharge by liable employer).

Moreover, *Turner Elkhorn* specifically disavowed "blameworthiness" as a basis for its decision. 428 U.S. at 17-18. In any event, the withdrawing employer in this case knowingly benefitted from labor obtained in part by the commitment to provide retirement benefits, just as the employer in *Turner Elkhorn* benefitted from the labor of its miners. Congress has reasonably decided, as it did in *Turner Elkhorn*, to make the Fund's employers responsible for its participants' pensions, as an "actual, measurable cost" of doing business. 428 U.S. at 19.

**D. Imposing Withdrawal Liability on Employers Withdrawing From a Multiemployer Plan is Constitutional.**

The employers have, in addition, advanced a number of arguments relating not to the issue of retroactivity but to the constitutionality of withdrawal liability *per se*. They contend that such liability is irrational, inequitable, and violative of the Takings Clause. The court below never reached any of these issues, which have, however, been rejected by *all* of the many lower courts that have considered them.

1. *Rationality*.—There is no merit to any of the four arguments made to prove that withdrawal liability is irrational. The employers first contend that withdrawal liability was unnecessary. Gray Br. 2 n.1. Congress, however, found that the loss of contributions from withdrawing employers frequently imposes increased obligations on remaining employers, and that where the industry supporting the plan enters a decline, the plan's financial base may be jeopardized. 29 U.S.C. § 1001a(a)(4) (Supp. V 1981). As the Seventh Circuit concluded in *Peick*, 724 F.2d at 1268, Congress acted rationally to avert this danger:

Congress has no obligation to wait until a potential problem matures into an actual crisis before enacting corrective legislation addressing the problem. Congress acted rationally in choosing to try to forestall future pension crises involving millions of workers by essentially forcing withdrawing employers to fully fund future pension liabilities.

Second, Gray argues that retroactive withdrawal liability is irrational when imposed on "involuntary" withdrawals.<sup>15</sup> Gray Br. 33. In any event, in view of the myriad forces that may encourage or deter decisions to

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<sup>15</sup> *Amicus* Chamber of Commerce, on the other hand, suggests that Congress should have distinguished between "illegitimate" and "good faith" withdrawals. Chamber Br. 21. The conflicting and indefinite "legislative programs" suggested to this Court emphasize that these issues are properly resolved by the Congress and not by the courts. See PBGC Br. 23 n.19.

withdraw, Congress cannot reasonably be required to fashion legislation that meticulously defines "voluntary" and "involuntary" withdrawals and assesses liability for only the former.<sup>16</sup> Moreover, even where an employer's withdrawal might be deemed "involuntary," a congressional decision not to assess withdrawal liability would transfer that employer's share of the plan's obligations to other employers. As one district court observed:

From the perspective of the remaining employers in the plan and of the employees who expect to receive benefits from the plan, the voluntariness of one employer's withdrawal is irrelevant. What they are concerned with is there being sufficient funds to meet the obligations of the plan.

*Pacific Iron & Metal Co. v. Western Conference of Teamsters Pension Trust Fund*, 553 F. Supp. 523, 526 (W.D. Wash. 1982).

Third, Gray suggests that when a withdrawn employer has contributed to a plan for only a brief period, its employees may have earned few, if any, pension entitlements, and thus the assessment of withdrawal liability against such an employer is irrational.<sup>17</sup> However, the fact that an employer's own employees do not vest under a plan while that employer is contributing does not mean that they will not vest later and earn benefits that are based in part on their service to the withdrawn employer. Indeed, it is in the very nature of the construction industry that employees frequently change employers. A basic purpose of multiemployer plans is to permit employees to retain the pension credits they earn with an employer whom they serve only briefly.

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<sup>16</sup> Gray suggests that its own withdrawal was "involuntary" because it "was not able to reach a new agreement with its employees' union." Gray Br. 54. There is surely a substantial "voluntary" component in an employer's decision not to agree to terms requested by the union representing its employees.

<sup>17</sup> This argument, of course, does not apply to Gray, which contributed to the Trust Fund for 15 years. Gray Br. 5.

Finally, Gray argues that the existence of unfunded vested benefits does not, in and of itself, indicate a danger to plan benefit security or a need for withdrawal liability. Gray Br. 44. However, as the Seventh Circuit observed (*Peick*, 724 F.2d at 1274), Congress was reasonable not to limit the assessment of withdrawal liability to situations where "the financial circumstances of the plan [are] particularly parlous," because:

termination or disaster, or escape from termination or disaster, is rarely predictable with certainty. And it is not irrational—it is in fact merely financially conservative—to measure financial health by the unfunded vested liability, even though the ultimate life-span of the plan may be unpredictable.

Congress realized that any other test of a plan's "need" for withdrawal liability would have the same critical defect as did liability on termination—it would create an incentive to withdraw before the plan reached the legislatively determined "danger" point, shifting the funding burden to remaining employers.

2. *The Equities*.—Gray and certain *amici* argue that since employers have "no control" over their plans' benefit levels, it is inequitable to impose withdrawal liability. Both the premise and the conclusion of this argument are flawed. Employers do have substantial control over the plans. Not only do they select half of all trustees, thereby making consideration of their interests certain (see *Textile Workers*, 5 EBC at 1009), but they also can control plan benefit levels through collective bargaining.<sup>18</sup> And the plan in *NLRB v. Amax Coal Co.*, 453

<sup>18</sup> The Associated General Contractors of America, the employer association that negotiated the collective bargaining agreement adopted by Gray (J. App. 16), urges that "[c]ontractors involved with plans that are less well-funded should work to improve funding either at the bargaining table or through the plan trustees." Inventory of Construction Industry Multiemployer Pension Plans (February, 1983), p. 6 (R. App. 12a). The AGC notes that "management trustees have become more active in plan administration and many plans have gone to great lengths to improve funding." *Id.* p. 3 (R. App. 12a). Indeed, Senator Dole observed that the

U.S. 322 (1981), upon which Gray relies, itself demonstrates employers' ability to restrict trustee authority over benefit levels through collective bargaining. *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573-74 (1982).<sup>19</sup>

Moreover, Gray and the other employers have knowingly benefitted from multiemployer funds and have had six years' notice that their obligations to support benefits could exceed their contractual obligations. The Fourth Circuit concluded in *Republic*, 718 F.2d at 639, that this made withdrawal liability equitable:

Congress did not in our view act inequitably in requiring that employers who received the full benefit of their employees' services should bear the cost [of unfunded pension liability] rather than the employees who provided their services on the actual or implied promise that they would ultimately enjoy their vested, accrued pension benefits.

The fact remains that *someone* must bear the burden of shortfalls in multiemployer plans. As the Second Circuit explained (*Textile Workers*, 5 EBC at 1009 (quoting 126 Cong. Rec. 20,234 (1980) (Sen. Matsunaga))):

When Congress was considering the [Multiemployer Act], it had to decide whether the withdrawing employer, remaining employers, or employee participants should bear the burden of any shortfalls in multiemployer plans . . . . Certainly, it was not unreasonable for Congress to require the withdrawing employers to bear their burden of funding, rather than to leave the remaining employers "holding the bag."

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Multiemployer Act could result in increased direct bargaining over multiemployer plan benefits. 126 Cong. Rec. S10103 (daily ed. July 29, 1980).

<sup>19</sup> Gray suggests that plan trustees may be required by this Court's holding in *Amaz* to use withdrawal liability payments to increase benefits. Gray Br. 43-44. The *Peick* district court carefully considered *Amaz* and specifically rejected this argument. 539 F. Supp. at 1048 & n.48.

Gray also argues that withdrawal liability is imposed "without regard to Gray's ability to pay," and that unlike termination liability under ERISA, it is not limited to 30 percent of Gray's statutory net worth. Gray Br. 36. Gray does not claim that its own liability assessment exceeds 30 percent of its statutory net worth or is unduly harsh or burdensome. Several of the *amici*, however, do. Careful examination reveals that the Act's method of assessment is reasonable, and that the alleged hardships faced by the *amici* may well be illusory.

In considering the Multiemployer Act, Congress was aware that the 30 percent limitation had been an incentive to plan termination under ERISA and could be an even greater incentive to withdrawal under the Multiemployer Act. See PBGC Br. nn. 9, 19. Congress also realized that just as an employer's net worth may not accurately reflect its ability to meet its funding obligations, net worth may also not reflect ability to meet withdrawal liability obligations. PBGC Br. 8 n.9; *see also infra*, page 18, note 22. Thus it altered the means of assessing liability and eliminated the 30 percent limitation.<sup>20</sup> However, it provided numerous more carefully crafted provisions that moderate an employer's liability. *See Peick*, 724 F.2d at 1273-74; *Textile Workers*, 5 EBC at 1010.<sup>21</sup>

<sup>20</sup> One provision preserves a net worth limitation on the liability of an employer that closes or sells its business. 29 U.S.C. § 1405(a) generally limits the liability of such an employer to a percentage of the value of the business. 29 U.S.C. § 1405(a)(1)(A), (a)(2). The alternative limit in 29 U.S.C. § 1405(a)(1)(B) ordinarily does not increase the limit under section 1405(a)(1), because it is difficult for plans to determine "the unfunded vested benefits attributable to employees of the employer." *See* 126 Cong. Rec. S10103 (daily ed. July 29, 1980) (Sen. Dole). *See* PBGC Opinion Letter 82-8 (Mar. 25, 1982) (R. App. 13a-14a). Of course, the limitation in 29 U.S.C. § 1405 is unnecessary for the construction industry, where the sale or closing of a business does not constitute a withdrawal. 29 U.S.C. § 1383(b)(2)(B).

<sup>21</sup> The brief of *amicus* TMX states that the Multiemployer Act provides "no meaningful moderation whatever" of "liability for

Moreover, the effect of replacing the 30 percent limitation is substantially less than the *amici* suggest. So far as the PBGC is aware, every employer that has asserted that the liability assessed against it exceeds 30 percent of its net worth has challenged the assessment and reserved the right to reduce the amount through arbitration.<sup>22</sup>

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pre-enactment withdrawals." TMX Br. 29. However, TMX has stated that its withdrawal liability is limited by Section 4217(a) (2) of ERISA (29 U.S.C. § 1397(a) (2)). Amended Complaint for Declaratory and Injunctive Relief, ¶ 58 (R. App. 7a). The specific purpose of Section 4217 is to reduce the impact of the Multiemployer Act's retroactive application. PBGC Br. 39-40 n.37. Indeed, the application of Section 4217 to TMX may serve not only to reduce the amount of any withdrawal liability owed, but to prevent the occurrence of a withdrawal, and thereby to eliminate liability entirely.

Furthermore, the Act allows an abatement of liability if an employer resumes covered operations after a complete withdrawal or increases its contribution base after a partial withdrawal. 29 U.S.C. §§ 1387, 1388. The court below believed that 29 U.S.C. § 1387 offered no relief to withdrawing employers because the PBGC had not yet issued regulations covering reduction or waiver of their liability should they rejoin their plans. 705 F.2d at 1514, *but see* the PBGC's Proposed Rule, Reduction or Waiver of Complete Withdrawal Liability, 49 Fed. Reg. 8036 (Mar. 6, 1984). However, if Gray had wished to rejoin the Fund, the Act provided for moderation of Gray's liability even in the absence of a regulation. Section 405 of the Multiemployer Act, 94 Stat. 1303, 29 U.S.C. § 1461 note; PBGC Opinion Letter 83-17 (Aug. 1, 1983) (R. App. 8a-9a).

<sup>22</sup> *Amici* TMX and E.W. Bohren Transport, for example, state that they or their corporate parent were assessed \$8.6 million in withdrawal liability in connection with their cessation of business as interstate motor carriers. Far from conceding that these assessments are correct, however, TMX and Bohren have asserted statutory defenses that may eliminate their liability entirely. *Transport Motor Express, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 724 F.2d 575, 577-78 (7th Cir. 1983). Moreover, the "employer" in *Transport Motor* for purposes of withdrawal liability is United Technologies Corporation, a billion-dollar conglomerate. See 29 U.S.C. § 1301(b) (1) and TMX Br. 3 n.9. Consequently, any withdrawal liability actually owed would be a

3. *Takings Clause*.—Certain *amici* also argue that the Multiemployer Act raises questions under the Takings Clause. But every court that has considered this claim has correctly held that an employer's asserted contractual right to withdraw from a pension plan without liability is not "property" within the meaning of the Takings Clause. See, e.g., *Peick*, 724 F.2d at 1276; *Republic*, 718 F.2d at 642-43.

### CONCLUSION

Congressional enactments requiring improved pension funding are tempting targets for constitutional attack. Because such laws anticipate the needs of the future, their

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minuscule portion of net worth and could hardly be described as "crippling". Gray Br. 11.

Similarly, *amicus* G&R Roofing Company asserts that its assessed withdrawal liability of \$687,000 amounts to 40 percent of its "stockholder equity." However, net worth under ERISA is based upon fair market value and may substantially exceed stockholder equity. 29 C.F.R. § 2622.4; see *PBGC v. Ouimet Corp.*, 711 F.2d 1085, 1088 n.8 (1st Cir. 1983), *cert. denied*, 52 U.S.L.W. 3369 (Nov. 7, 1983) (U.S. No. 83-347). Shareholder equity particularly understates fair market value in the construction industry, where firms rely on rented equipment and their book value may be "only a fraction of the amount that would be due under [the Multiemployer Act]." 1289 BNA Construction Labor Rep. A-12 (Aug. 6, 1980) (R. App. 5a). Moreover, G&R has never admitted that the amount assessed against it is correct and has acknowledged in open court that its withdrawal liability could be less than half that amount. Reporter's Transcript of Proceedings in Ninth Circuit at 122-123 (Dec. 7, 1982) (R. App. 15a).

In *Republic*, *amicus* Republic Industries has avoided arbitration while asserting a statutory defense that would eliminate its liability altogether. Opposition of Amicus Curiae PBGC to Petition for Certiorari at 3 n.5. Republic has never acknowledged even having withdrawn from any of the plans that have assessed liability against it, and it admits that if Section 4225 of ERISA (29 U.S.C. § 1405) applies to it, the total withdrawal liability it owes will be only 16 percent of its current assessment. Reply Brief for Appellant in *Republic Industries, Inc. v. Central Pennsylvania Teamsters Pension Fund*, No. 82-1251 (3d Cir., filed August 18, 1982) 13 (R. App. 16a).

benefits may appear remote, while their impact is immediate and painless legislative alternatives are easily asserted. But the legislative process is uniquely suited to the complex task of accommodating present and future economic needs. This Court should defer to Congress' judgment that the Multiemployer Act's retroactive effective date was necessary to achieve the Act's objective of employee retirement security. The Ninth Circuit's contrary decision should be reversed.

Respectfully submitted,

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March 1984

## **APPENDIX**

## APPENDIX

U.S. NEWS &amp; WORLD REPORT, PP. 73, 74

February 6, 1984

IS YOUR PENSION SAFE FROM  
COMPANY SHENANIGANS?

Employers' maneuvers to strip retirement plans  
of surplus cash are drawing fire  
from workers and regulators.

Billions of "extra" dollars in company pension plans are becoming tempting targets to corporate managers—and a new source of worry to workers.

More and more companies are tapping overflowing pension coffers to raise investment capital, finance mergers, fend off unwanted takeovers and make their earnings reports fatter.

. . . .

Members of both the House and Senate are working on legislation that would generally prevent managers from raiding pension kitties. Exceptions would be allowed in cases where employers need the money to continue operating and issuing paychecks.

Ironically, though prospects for passage remain dim, just the threat of such a bill may be enough to accelerate the pace of terminations as companies rush to claim extra millions of dollars while they can.

284 BNA PENSION REPORTER A-22 (March 31, 1980)

. . . .

The only other rollcall vote during the markup was over an amendment proposed by Rep. Richard T. Schulze (R-Pa.) which would have put a 3 percent per year reduction on the guarantee for subsidized early retirement benefits.

The amendment was opposed by the coalition of labor and employer groups that support the legislation. [PBGC

Executive Director Robert E.] Nagle indicated that the coalition includes the National Coordinating Committee for Multiemployer Plans, National Construction Employers Conference, Food Marketing Institute, United Food and Commercial Workers, Western Conference of Teamsters, ERISA Industry Committee, National Association of Manufacturers, and others.

Nagle opposed the amendment on the ground that it would create a disparity in guarantees between the single employer and multiemployer programs. The amendment was defeated by a vote of 21-12.

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1289 BNA CONSTRUCTION LABOR REPORTER  
A-11-A-13 (August 6, 1980)

. . . . .

CONGRESS MISSES DEADLINE ON  
MULTIEMPLOYER PENSION BILL;  
MANDATORY COVERAGE IN EFFECT

Despite several last-ditch efforts to get either the substantive multiemployer plan termination insurance revision bill or another delay bill through Congress, the August 1, deadline for avoiding mandatory coverage of multiemployer plans under the current plan termination provisions of ERISA was not met and those provisions went into effect.

As in the past, floor action on the substantive bill (H.R. 3904) was delayed until almost the last minute. The Senate passed the measure in a midnight session on July 29. However, the Senate version of the House-passed bill included not only numerous germane amendments, but several nongermane amendments which drew criticism from the Administration as well as a number of House members.

The House did not receive the bill from the Senate until July 31 and attempts to bring the measurement [sic] to the House floor were thwarted both that afternoon and the

following morning. The House then adjourned for the August work period and the Democratic convention, barring further action until it reconvenes on August 18.

Mandatory coverage of multiemployer plans under Title IV of ERISA has been delayed four times since the original January 1, 1978, deadline. The House passed the bill more than a month before the third deadline of July 1, 1980, and agreed reluctantly in June to delay coverage a fourth time because of the Senate's inability to move the proposed legislation (*CLR 1284*, A-6).

[p. A-12]

With only about 48 hours to go before the latest deadline, the Senate passed its revised version and, over the strenuous objections of Senators Harrison A. Williams (D-NJ) and Jacob Javits (R-NY), tacked on a variety of nongermane riders on such issues as the Occupational Safety and Health Act, the Mine Safety and Health Act, and affirmative action requirements (*CLR 1288*, A-14). The two senators argued that attaching the nongermane amendments could impede passage by the House because they involve touchy subjects for House members, all of whom are up for reelection in November.

Members of the two House committees with jurisdiction over the bill, Labor and Ways and Means, were in meetings during most of the day on July 30 trying to decide how best to deal with the Senate bill. Speculation at that time was that they would try to bring the bill to the House floor, strip off the nongermane amendments, perhaps add a few germane amendments, and dump the bill back in the Senate's lap before the deadline.

However, no attempt was made to bring the bill to the House floor until early evening on July 31 and the Senate already had adjourned for the day. In any event, the attempt failed. House rules required unanimous consent before the bill could be considered and Rep. John Rousselot (R-Calif.) objected. Rep. John Ashbrook (R-Ohio) then attempted to bring yet a fifth delay bill to the floor, but that effort also met with an objection.

That scenario was repeated on the morning of August 1, at which point the House adjourned for the recess. The conflict broke down essentially along party lines, with Democrats seeking consideration of the substantive measure and Republicans pressing for another delay. Some sources indicated that the Republicans favored keeping in at least some of the Senate's nongermane amendments, and perhaps adding a few of their own that they could not get through when the House originally took up the bill, and that the clearest way to achieve that goal was by enacting a further delay and demanding a conference with the Senate.

The Republicans apparently were operating on the assumption that the Democrats would cave in on the delay when it became clear that the substantive bill could not be passed before the August recess. The Democrats stuck to their guns, however, and it was Rep. Joseph Gaydos (D-Pa.) who made the formal objection and blocked the final attempt to bring the delay bill to the House floor.

There were indications that if the substantive bill had been sent to the President with the nongermane amendments intact, it might have been vetoed. In a press conference prior to the House action, Secretary of Labor Ray Marshall vowed that the Administration would fight the amendments.

"This is a serious situation and as Secretary of Labor, I am committed to doing everything in my power and this Administration will continue to do everything in its power to assure that the rights of the American worker are preserved," he said. "This Administration will not sit idly by and permit the anti-worker forces in this country to weaken workplace standards which we deem essential for the protection of American workers."

The Department was surprised by the last-minute amendments in the Senate and had only a few hours to lobby against them, Marshall noted. He emphasized that

the Administration is committed to working toward getting a "clean" version of the multiemployer bill approved.

Meanwhile, the termination insurance provisions of ERISA are in effect for all multiemployer plans. Although the ramifications of that probably won't be known immediately, industry sources speculate that some of the weaker plans will take this opportunity to terminate and avoid the employer liabilities that would attach if the provisions of HR 3904 were in operation. Liability under the current provisions is limited to 30 percent of the employer's net worth, as opposed to a continuing obligation to fund that would be imposed under the PBGC bill. For many employers, the net worth figure would be only a fraction of the amount that would be due under the terms of H.S. [sic] 3904.

[p. A-13]

This is particularly true in industries such as mining and construction where heavy equipment may be rented and actual net worth may be small.

Construction industry sources speculate that when the House reconvenes on August 18, one of two actions is likely to take place. One is that Frank Thompson (D-NJ), former chairman of the House Labor Committee's Subcommittee on Labor-Management Relations, will ask for a closed rule for an up or down vote on the Senate bill without the nongermane amendments. Another option is for John Erlenborn (R-Ill.) to ask for a rule to vote on the Senate bill with the germane amendments only, and for a second vote on the nongermane package.

Observers on the management side of the construction industry do not anticipate an exodus by contractors from multiemployer plans. "You don't just jump out the window in this kind of situation," one source remarked. If the situation in Congress now existed this spring during the height of construction contract negotiations, "it would have been a different matter," another source commented, because employers would have been in a position to get out from under their labor agreements under notification

clauses as the expiration date approached. The timing of legislation poses dramatic possibilities for the UMW-coal industry contract talks which will begin soon.

Technically, contractors could abandon their plans as of August 1 and assume that a "window" exists between that date and the time Congress may finally take action on the termination insurance legislation. However, several industry observers discount the likelihood of this kind of action because of the bargaining agreement violations and because of the probability that any action Congress takes will be retroactive to August 1. They also point out that under the Supreme Court's ruling in *Nachman v. PBGC* in May (CLR 1277, A-10, E-1), the courts are likely to give special consideration to Congressional intent instead of the chronology of the legislation.

*PBGC: Prospects Grim*

The failure of Congress to pass the bill before the deadline will create uncertainties for multiemployer plan participants and will unsettle the collective bargaining process, according to Robert Nagle, executive director of PBGC. The Corporation previously advised Congress that the current law will have a destabilizing effect on many multiemployer plans because it will give employers an incentive to leave the plans at the first sign of financial difficulty.

The eventual effect, Nagle said, will be to hasten the failure of many multiemployer plans and "to impose extremely high costs" on the termination insurance system. These costs will have to be borne by other plans and their participants and they may even bankrupt the insurance program, he said. Congress must move as quickly as possible to complete action on the legislation, he emphasized. "It would be unfortunate if insistence on the nongermane amendments were to further delay passage of this much-needed legislation."

. . . .

COMPLAINT, *Transport Motor Express, Inc., et al. v. Central States, Southeast and Southwest Areas Pension Fund*, No. 81 C 4535 (N.D. Ill., filed Sept. 30, 1981)

# AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Transport Motor Express, Inc., E.W. Bohren Transport, Inc., and Essex Group, Inc., by their attorneys, complaining of defendant Central States, Southeast and Southwest Areas Pension Fund, respectfully allege.

. . . . .

54. None of the plaintiffs has continued to perform any of the work covered by any of the labor agreements referred to in paragraphs 11 and 12 or any of the work performed at any of the facilities operated by TMX or Bohren prior to their cessation of common carrier operations.

55. No withdrawal from the Central States Fund by any of the plaintiffs has occurred and no withdrawal liability is owed to the Central States Fund by any of the plaintiffs.

## COUNT TWELVE

(on behalf of Plaintiffs TMX and Bohren)

56. Paragraphs 1 through 31 are hereby repeated and realleged and made a part of this Count Twelve.

57. At some or all of the facilities of TMX and Bohren, covered operations permanently ceased before April 29, 1980, within the meaning of Section 4217(a)(2) of ERISA, as amended by the MPPAA, 29 U.S.C. § 1397(a)(2).

58. Even assuming *arguendo* that the MPPAA is constitutional, the withdrawal liability of TMX and the withdrawal liability of Bohren are each limited to the amount determined after application of Section 4217(a)(2) of ERISA, as amended by the MPPAA.

. . . . .

## PBGC OPINION LETTER 83-17 (Aug. 1, 1983)

Dear \_\_\_\_\_:

This responds to your letter concerning Section 4207 of the Employee Retirement Income Security Act. Specifically, you inquire whether an employer that withdraws from a plan and subsequently renews its obligation to contribute to the plan would continue to be subject to withdrawal liability, and if so, whether the "trust fund is empowered to waive any withdrawal liability in such a circumstance".

In our view, plans have authority to adopt reasonable rules governing collection of withdrawal liability, including abatement. This authority is subject to the terms of regulations to be issued by PBGC under Section 4207 in the event that an employer who has withdrawn from the plan subsequently resumes covered operations or renews an obligation to contribute under the plan.

Congress also recognized that the PBGC would require time to develop the regulations—more than 60 of them—that it is specifically required or authorized to promulgate under the Multiemployer Pension Plan Amendments Act of 1980 ("Multiemployer Act"). In order not to delay the effective functioning of the 1980 amendments, Congress provided in Section 405(a) of the Multiemployer Act:

if the way in which any [Multiemployer Act] amendment will apply to a particular circumstance is to be set forth in regulations, any reasonable action during the period before such regulations take effect shall be treated as complying with such regulations for such period.

Therefore, pending the issuance of PBGC regulations, plans may adopt reasonable rules to waive or reduce withdrawal liability when a withdrawn employer reenters the plan. Such rules must include whatever restrictions or conditions are contained in PBGC's regulations under Sec-

9a

tion 4207 beginning on the effective date of such regulations.

I hope this response is helpful to you.

Sincerely,

/s/ Henry Rose  
HENRY ROSE  
General Counsel

10a

INVENTORY  
OF  
CONSTRUCTION INDUSTRY

MULTIEMPLOYER PENSION PLANS

[SEAL OMITTED IN PRINTING]

Associated General Contractors of America  
1957 E St. NW  
Washington, D.C. 20006

## [p. 1] AGC PENSION PLAN INVENTORY

February 1983

## INTRODUCTION

With the enactment of the Multiemployer Pension Plan Amendments Act of 1980, it became essential that contractors be aware of, and take an active interest in, the financial health of multiemployer pension plans. The current level of unfunded vested liability (UVL) as well as the upward or downward trend of liability are particularly important pieces of information.

This need for more and better data led AGC to undertake an inventory of construction industry multiemployer pension plans. Under the guidance of the ERISA Task Force, AGC has been attempting to gather information on as many of the more than 1,000 construction industry plans (according to PBGC) as possible.

This report represents a vastly expanded version of AGC's interim report of almost 200 construction industry multiemployer pension plans that was released in July, 1982 (see Fringe Benefit Bulletin #18-82). This current report contains information on over 650 plans that contractors contribute to. While this survey does not include all of the construction industry related multiemployer plans, it does include most of the larger plans and appears to provide a fairly representative sample of construction industry multiemployer pension plans.

. . . .

[p. 3]

## UNFUNDED VESTED LIABILITY [UVL] (419 Plans)

Attachment A represents individual plan data on plan assets, unfunded vested liability (UVL), the ratio of plan assets to vested benefits, and yearly contributions. An analysis of the level of UVL maintained by each plan reveals a wide swing with a high of \$3.57 billion to no UVL and all variations in between. Of 419 plans providing in-

formation on the level of UVL, a surprising 204 or 48.7 percent had no UVL. This still leaves 51.3 percent of survey plans with UVL and, in many cases, potentially large employer withdrawal liability. It should be noted, however, that much of the UVL data is for 1978 or 1979. Since that time, management trustees have become more active in plan administration and many plans have gone to great lengths to improve funding. This effort should increase the number of plans that are well-funded.

[p. 6]

. . . .

### Conclusion

There are few definite conclusions that can be drawn in the aggregate from AGC's pension plan inventory effort excepting that the funding levels of plans vary widely without any apparent pattern. There can be no doubt, although more plans are better funded than we first expected, that unfunded vested liability and potential employer withdrawal liability are still a serious problem for our industry. Contractors involved with plans which are less well-funded should work to improve funding either at the bargaining table or through the plan trustees. Various options are available including an agreement to divert a portion of plan contributions to reduce UVL or an agreement to cap benefits until funding reaches a certain level. Contractors involved with well-funded or fully-funded plans should consider trust or collective bargaining agreement language preventing [sic] any slippage in the funding level. Conversion to a defined-contribution plan should also be reviewed. Defined-contribution plans specifically limit an employer's liability to his agreed-to per hour contributions and also provide significant advantages to construction workers in regards to portability and vesting.

Dan Knise

## PBGC OPINION LETTER 82-8 (March 25, 1982)

Dear \_\_\_\_\_:

This responds to your letter in which you requested our opinion as to the meaning of "the unfunded vested benefits attributable to employees of the employer" as used in Section 4225(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") *as amended by* the Multi-employer Pension Plan Amendments Act of 1980 ("Multi-employer Act"). Specifically, you are concerned about interpretations to the effect that this amount is the same as determined under Section 4211 of ERISA to be "the amount of the unfunded vested benefit allocable to an employer . . . ." We conclude that the two amounts are not the same.

Section 4202 of ERISA requires, upon the withdrawal of an employer that the plan sponsor "determine the amount of the employer's withdrawal liability." Section 4201(b) of ERISA defines withdrawal liability as "the amount determined under Section 4211 to be the allocable amount of unfunded vested benefits, *adjusted* . . . in accordance with Section 4225." [Emphasis added.]

Section 4225(a) of ERISA provides a limitation on the withdrawal liability of an employer whose withdrawal from a multiemployer plan resulted from a "bona fide sale of all or substantially all of the employer's assets in an arm's-length transaction to an unrelated party." In this circumstance the employer's liability is limited to the greater of: (1) "a portion . . . of the liquidation or dissolution value of the employer" determined in accordance with a schedule of marginal rates ranging from 30% to 80% (Section 4225(a)(1)(A), (a)(2)); or (2) "the unfunded vested benefits attributable to employees of the employer." (Section 4225(a)(1)(B)).

The plain language of the statute makes it clear that "the unfunded vested benefits attributable to employees of the employer" under Section 4225(a)(1)(B) is not identical

to the amount of the unfunded vested benefits allocable to an employer under Section 4211. For example, even the "direct attribution" allocation method under Section 4211(c)(4) allocates to the employer a share of unfunded vested benefits which are not attributable to employees of the employer. Moreover, if the two amounts were identical, Section 4225(a) would be meaningless—it would never reduce liability below the amount allocated to the employer under Section 4211.

If the plan sponsor does not or cannot make the determination required under Section 4225(a)(1)(B), the employer's liability is limited to the amount determined in accordance with the schedule provided in Section 4225(a)(2). In any event, the plan sponsor is obligated to apply Section 4225(a), where appropriate. The failure to do so would be inconsistent with Title IV of ERISA, and would be reversible in the dispute resolution process under the Multiemployer Act.

I hope this adequately responds to your question. If you have further questions on this matter, please contact \_\_\_\_\_ of my staff at the above address or at \_\_\_\_\_.

Sincerely,

/s/ Henry Rose  
HENRY ROSE  
General Counsel

REPORTER'S TRANSCRIPT OF PROCEEDINGS AT  
122-23, *Shelter Framing Corp. et al. v. PBGC, et al.*,

Appeal No. 82-5271 (9th Cir., argued December 7, 1982)

[122]

\* \* \* \*

THE COURT: Three minutes (inaudible).

MR. MERRILL: Michael Merrill on behalf of G & R Roofing Company.

We are in the unfortunate position of having retroactivity and five other distinct constitutional issues to present, and I guess I will do a little picking and choosing here.

THE COURT: All of it was very well briefed.

MR. MERRILL: Let me initially remark, if I may, that our challenge is viewed to be a facial effect [sic] on the statute.

We have conferred with Mr. Watson on behalf of the Pension Trust and with (inaudible). We can represent to this court that under no conceivable circumstances that actuarial assumptions and methods are being applied where G & R Roofing Company's liability be [sic] [123] less than \$300,000.

We are not talking about a hypothetical litigation in this case. There is no feature about this case that will be mooted by arbitration nor would the issues be meaningful if changed. (Inaudible).

The Pike [sic] decision proceeded to make a facial determination of the constitutionality of the statutes with no facts as to withdrawal liability.

Truly our position cannot be any worse in terms of presenting (inaudible).

\* \* \* \*

REPLY BRIEF FOR THE APPELLANT at 13,  
*Republic Industries, Inc. v. Central Pennsylvania*  
*Teamsters Pension Fund*, Appeal No. 82-1251  
(3d Cir., filed August 18, 1982)

\* \* \* \*

When Johnson was liquidated in August 1981 its remaining assets were transferred to Republic (J.App., 7-8; Republic's Initial Brief at 3, 4 & n.3). If the Fund were prepared to concede that Johnson had effected a bona fide sale of substantially all of its assets in an arm's-length transaction to an unrelated party, the Fund would presumably have made a different claim against Johnson.

Even if § 1405 were applied, Republic would nevertheless be subject to an enormous liability under the statutory formula—approximately \$3,000,000. A crippling retroactive taking of Republic's property would thus still be imposed.

\* \* \* \*